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No.

In The

Supreme Court of the United States

October Term, 1983

SEATRAIN LINES, INC., and J & J DENHOLM MANAGEMENT, LTD.,

Petitioners,

vs.

JOHN CARCICH, PASQUALE INTRONA and VINCENZA INTRONA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioners' brief belies itself. It purports to describe a jurisdictional basis in this Court, but the reader is led, however imperfectly, on a tedious odyssey through a myriad of factual

disputes — all resolved by the jury below and reviewed by the New York Appellate Division and Court of Appeals. Foundering under the weight of the facts, petitioners desperately contend for some imagined disparity between the legal principles applied below and those which obtain under *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

But there is nothing to any of this. All of petitioners' issues contain heavy factual components, and that alone is fatal at this level. The only really serious argument raised by petitioners relates to so-called "charge error" in allegedly not following the dictates of *Scindia*. Specifically, the contention is that Justice Greenfield erred in allegedly charging that the petitioners had a duty to warn of the danger that lurked in the hold *without* also charging that the duty was *not* operative where the petitioners had reason to believe that the stevedore employer (United Terminals Inc.) would "*anticipate*" the danger.

In point of fact, Justice Greenfield did not charge as alleged. As demonstrated below, he allowed the jury to define the duty based upon custom and practice (A3015-16), as specifically authorized by *Scindia* (451 U.S. at 176, 179-80). But, even absent contrary custom and practice,, the fact is that *Scindia* in no way establishes the qualified duty contended for by petitioners. Simply put, the formulation of duty proffered by petitioners has *no* application where the vessel interests *create* a hidden, highly dangerous condition, and fail to provide adequate warning or adopt other measures designed to safeguard the lives of the men who must encounter that condition. *That* is the teaching of *Scindia* (451 U.S. at 167, 175-76), and the rule has been reaffirmed by many courts in many jurisdictions in decisions coming *after Scindia*. We discuss this in detail below.

Furthermore, there is absolutely *no* authority which even suggests that the exculpatory language favored by petitioners has

any application to Seatrain, the terminal operator. In fact, petitioners now concede that the charge below was correct "if Seatrain were not a §905(b) 'vessel' " (p. 18). And there is absolutely no authority which would convert a terminal operator into a "vessel" for these purposes.

The fact is, as we point out below, that the duty incumbent upon Seatrain was either the General Maritime Law standard of "reasonable care under the circumstances", *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), or the New Jersey rule of "ordinary care to render the premises reasonably safe for the purposes embraced in the invitation." *Piro v. Public Service Electric & Gas Co.,* 103 N.J. Super. 446, 247 A. 2d 678, 682 (1968), *aff'd,* 53 N.J. 7, 247 A. 2d 667 (1968). Thus, even if petitioners were somehow correct in their construction of 33 U.S.C. §905(b) as it applies to shipowner Denholm, the concession with respect to joint tortfeasor Seatrain assures that respondents will recover all the jury awarded them. This provides yet another reason why this case lacks importance for this Court.

Finally, petitioners incorrectly argue that there was charge error because the jury was informed not to consider taxes (A3052). Without discussing the merits of the issue, suffice it to point out that petitioners offered absolutely no proof on the subject of taxes and, thus, there was no foundation for the deduction which they prefer. *Fannetti v. Hellenic Line, Ltd.,* 678 F. 2d 424, 432 (2nd Cir. 1982). In his decision below, Justice Greenfield took appropriate cognizance of the "state of the proof" on this issue (A14).

STATEMENT OF THE CASE

The story begins in Bremerhaven, Germany, where the Seatrain interests loaded four 20 foot containers in the hold of the ASIALINER for the first time (A169, A886, A1208). Previously, all 20 footers had been carried on deck (A1208) where their dimensions are fully visible. The loading in Bremerhaven was supervised by Mr. Anthony Shute-Henderson, Operations Manager for Seatrain GMbH (A420), a subsidiary of the Seatrain defendant (A422). Four 20 foot containers were stowed above deck on the hatch covers for Bay 10 (A147). Henderson testified that all of the 20 footers could just as easily have been stowed above deck (A450). Nonetheless, four of them were placed at the bottom level of Bay 10 (Exhibit 23, RA53)*, even though Henderson did not know whether or not Seatrain had a 20 foot spreader or other appropriate equipment for discharging these containers at their ultimate destination in Weehawken, New Jersey (A451).

In fact, New York (Weehawken) did not have the capability of handling 20 foot containers below deck (A101) because there was no 20 foot spreader available (A140) and because the center twist locks had been removed from the operational 40 foot spreaders (A104-5). These locks would engage the adjacent corner castings (Exhibit 16, RA51) of abutting 20 foot containers, so that such a tandem could be lifted as a unit in a single "pick". Petitioners contend that the spreader was "designed to lock into the four corner castings on the upper surface of one container of like [40 foot] dimension" (p. 5), but the fact is that Seatrain removed these center twist locks in 1971, because the maintenance was expensive and time consuming (A217-18). This was

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* References preceded by "RA" are to pages in the Respondents' Appendix filed with the New York Supreme Court, Appellate Division—First Department.

unfortunate — if the center twist locks had remained in place there would have been no accident (A139-40).

Denholm's Chief Mate James Fowler was present when the four 20 foot containers were loaded in Bremerhaven (A476-77). He testified that the 20 footers on deck had been stowed in pairs, end to end, and *locked* to single 40 foot flatracks (Exhibit 11b, RA49) underneath (A1161-62), allowing the pairs to be discharged as one unit by a 40 foot spreader (A1205-6). However, the 20 footers which were loaded at the bottom of the hold were set in place piece by piece, with the flatrack landed first and then the two 20 footers on top (A477-78). Because the containers were not locked to the flatrack before being loaded into the hold they could no longer be locked prior to discharge. This was due to the fact that the cell guides (vertical steel members into which all containers below deck are stacked) were positioned so close to the corners of the containers that the flatrack locks could not be activated (A313-14, A1175). Obviously, if the 20 footers had been locked to the flatrack *before* loading the disaster in Weehawken would have never occurred. Petitioners claim that "the practice at Bremerhaven was never to handle 20 foot containers two at a time locked to a flatrack [463-4A]" (p. 9), but the page cited in no way supports the claim.

Chief Mate Fowler also testified that the 20 footers could have been stowed above deck as easily as below (A1168). And as the senior cargo officer aboard the vessel he certainly had the authority to tell the German longshoremen where to place the cargo (A580). Captain Robert Hopkins, a licensed British Master (A536), testified that the ship's officers have the right and the duty to tell loading longshoremen to either lock below deck containers to a flatrack or "take it out of there" (A582).

Petitioners argue that a flatrack is not intended to be used as a device to enable a 40 foot spreader to safely lift two 20 foot containers (p. 10), but this contention certainly foundered upon the explicit testimony of the ASIALINER's Master, Captain Munro, who stated that the 20 footers were carried locked to the flatrack because it was the "intention" to discharge them as a single unit (A1207). But there is more. Petitioners' witness, Mr. Arthur Mitchell, was quite definite — if the 20 foot containers are locked onto the flatrack "you can lift it up as one unit with no problem" (A926). The crane operator, Walter Slapkowski, noted that "the reason they had these flatracks, and locked to the flatrack are two 20 foot containers, is to pick up the whole unit, the two 20 footers, and the flatrack in one lift." (A137). And Captain Hopkins was clear about the fact that the "purpose" of the flatrack "is to tie both these containers as one unit." (A565).

Chief Mate Fowler admitted that he knew the 20 footers below deck were unlocked (A1163). Notwithstanding the obvious danger in attempting to lift two unlocked 20 foot containers with a 40 foot spreader, *Fowler provided absolutely no warning of this condition in the cargo plan, the log book, or otherwise* (A1163-64). And as Chief Mate, he had to approve the vessel's cargo plan (Exhibit 23) before sailing (A1167-68). But his derelictions did not end there. Upon arrival in New York, Fowler did not inform the Seatrain representatives or anyone else that the below deck 20 footers were unlocked (A1165), even though he had no reason to believe that the spreader gear at Weehawken could cope with this situation (A1180).

The truly wanton aspect of Fowler's negligence becomes apparent when one realizes that small metal implements called "stacking devices" (Exhibit 18a, RA52) could have been utilized to prevent the accident. These devices, when placed in the container corner castings, serve to block the spreader locks and prevent

a lift (A110). In fact, if the corner castings are blocked, the red "go" light in the crane cab will not activate, and the crane operator will not even attempt the lift (A111, A169). When this happens, the practice is to notify the ship's mate, who then lowers "cluster lights" into the hold to see what the problem is (A403-4). Unfortunately, Fowler did not utilize this simple "fail-safe" procedure.

While the ASIALINER made its way across the Atlantic, the vessel's cargo plan was air mailed to Seatrain's headquarters in Weehawken (A991-92). Copies of the plan were provided to Mr. Arnold Johnston (A999-A1000) who was Seatrain's Marine Operations Supervisor (A944-45). Johnston was in charge of the actual loading and discharging operations at Port Seatrain. He decided what work was to be done and how it was to be done (A946). As Johnston described it, he was the "immediate supervisor" of the stevedore hatch bosses (A987). The hatch boss of respondents' gang was Arthur Mitchell (A867).

From the cargo plan, Johnston was able to tell that there were four 20 foot containers below deck (A999-A1000). ***But Johnston was not told whether or not the 20 footers in question were locked, and he did not inquire (A969-70),*** even though he had a rapport with the ship's officers (A989) and talked to Chief Mate Fowler on the day discharge operations began at Port Seatrain (A1067-68).

Johnston talked to Mitchell and gave him copies of the cargo plan (A869). Johnston claims to have told Mitchell that four 20 foot containers were located below deck (A956-57). He was allowed to testify as to Mitchell's out-of-court statement that "I'll see what to do with those when I come to them" (A956-57), a statement which Mitchell did *not* confirm during *his* testimony for petitioners. Most importantly, however, ***Johnston conceded that he did not provide Mitchell with any information respecting***

the locked/unlocked status of the containers (A972), even though neither Mitchell nor any of the longshoremen at Port Seatrain, Weehawken, had ever encountered any 20 footers below deck. Petitioners now *concede* the lack of a warning (p. 7), arguing that it makes no difference.

Discharging began during the day on April 19, 1976, and continued well into the night. It was dark by the time the respondents' gang started on the containers inside Bay 10. Each bay has 9 cells, running from port to starboard, filled with stacks of containers. One of the vessel's cargo officers arrived when the hatch covers were opened and told the crane operator, Slapkowski, to begin with cell no. 4 (A149-52). Slapkowski then discharged five 40 foot containers, moving deeper and deeper into the hold (A155). *All witnesses* agreed that there were no lights in the hold (A168, A398, A812), and respondent Introna said that the interior of cell no. 4 was dark "like a cemetery" (A811).

When Slapkowski reached the deepest level of the cell, he lowered the spreader on top of what he thought was a 40 foot container and lifted (A153-55). As the containers began to emerge from the cell guide Slapkowski saw a split down the center and realized that he had lifted two 20 footers (A156). He immediately threw the controls into a stop position, and then a down position, but momentum carried the containers clear of the confines of the cell (A156). If the center twist locks had still been operative, as intended by the manufacturer, he could have engaged them at that time and prevented the containers from splitting away (A326). The center twist locks would have only required a half second to activate (A1253).

It was now too late to avert disaster. The containers weighed 14 tons apiece (A11), and the one on the right broke off and fell to the bottom of the bay (A156). The container on the left swung down but did not break off, causing the spreader to careen wildly

about, striking the containers stacked atop Bay 9 and Bay 11 (A157-58) and grievously injuring the respondents.

There were no ship's officers present on deck in the vicinity of Bay 10 during the entire discharge operation (A145), except for the cargo officer who stopped by and told Slapkowski to begin in cell no. 4 (A151-52). This officer was third mate Thomas (A474, A1209). He immediately left the scene and no one else appeared thereafter to provide supervision (A162).

All of this was consistent with the typical procedure aboard the ASIALINER — the officers were often present during the day but "after it got dark they disappeared." (A170). Slapkowski testified that this was not the practice on *other* container vessels (A177).

Captain Hopkins testified that the officers on the ASIALINER departed from accepted custom and practice in several major respects. In the first place, it is standard procedure to indicate on the cargo plan that a dangerous condition (such as unlocked 20 foot containers) exists below deck (A560-62). A notation such as "see Chief Officer prior to discharge" should appear on the document (A566) if only "for the sake of safety." (A566).

Furthermore, when containers are loaded, the Captain must assure that they are properly locked to their flatracks (A631, A651). It is also the custom and practice aboard container vessels for the ship's officers to be present on deck when cargo is handled to see that the job is properly done and all safety precautions are taken (A578). Hopkins stated that "as long as the cargo is being worked you must have a duty officer on the deck of that ship", and "it makes no difference" if an independent stevedore has been hired to provide the labor (A590). The Captain has clear authority to direct the stevedore with respect to discharge procedure

(A589). Petitioners provided no testimony or other evidence to controvert respondents' proof on this score.

Both of the 20 foot containers in question contained hazardous cargo, but the officers of the ship were unaware of this until after the accident (A3136, A3132). Neither container was listed on the hazardous cargo manifest (A1212-13) as required (A568). Petitioners argue that this demonstrates lack of notice (p. 9), but the point is that ship's officers *should* know when hazardous cargo is in the hold. Captain Hopkins testified that the obligation of the officers to be present on deck is even greater when hazardous cargo is being worked (A595). But petitioners' witness Mitchell conceded that the officers on Seatrain container vessels "very seldom" supervised the handling of hazardous cargo, as distinct from the practice on general cargo ships (A902). And this was so notwithstanding a Coast Guard Regulation (46 C.F.R. §146.02-17) which read, at the time of the accident, as follows:

> "Explosives or other dangerous articles or substances as cargo shall be handled or stowed on board vessels under the direction and observation of a qualified person assigned for such duty . . . . For foreign vessels such person shall be an officer of the vessel assigned to such duty by the Master of the vessel."

As mentioned above, it was as "dark as a cemetery" in cell no. 4 of Bay 10. Petitioners contend differently, but the truth of the matter was perhaps best reflected in the statement provided by Chief Mate Fowler, wherein he noted that he and Captain Munro examined the damage to the container at the bottom of the hold "from deck level only due to the relatively poor lighting available." (A3137).

Slapkowski also said that there was no lighting in the cell (A168), and another crane operator, one Sergio Germinario, testified that he had never seen any lights in the hold (A398) and that there were no lights above the deck level which illuminate the lower levels (A398). Petitioners try to convert this into a condition which was created by the stevedore *after* commencement of cargo operations (p. 13), but the fact is that their own witnesses, Johnston and Mitchell, "did not recall" whether "there was provision for ship's lighting in the cell of the bay." (A886-87, A976). Both agreed that the petitioners had the duty to provide such lighting (A917-18, A1114). All cargo ships carry flood or "cluster" lights (A614), and it would seem to have been a simple matter for the crew to hang these in the hold. But it was not done.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT CORRECTLY CHARGED THE JURY RESPECTING PETITIONERS' DUTY.

Petitioners assign error in the charge. They contend, on the authority of *Scindia*, that they had absolutely no duty to warn the plaintiffs or the stevedore of the hidden danger which Denholm had *created* in the dark recesses of the hold. They say this is so because they were entitled to assume that the stevedore would "anticipate" the danger and avoid it. This is wrong on the law and the facts.

A. The Duty of Seatrain

Scindia was a case about a shipowner's duty under §905(b) of the 1972 Longshoremen's Act (33 U.S.C. §§901 *et seq.*). But the duty described by *Scindia* can only apply to the potential defendants enumerated in that Act. Section 905(b) relates to a

longshoreman's cause of action against a "vessel", the definition of which appears in §902(21):

> "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice,* agent, operator, charterer or bare boat charterer, master, officer, or crewmember."

Although petitioners have sometimes asserted that Seatrain was a time charterer [arguably a "charterer" for purposes of §902(21)], the fact is that neither party proved that Seatrain came under the Act, as petitioners' attorney enthusiastically pointed out at trial (A2822-23).

Respondents *did* prove that Seatrain was the "terminal operator", in total control of all activity at Port Seatrain (A341-42, A906). And the charge to the jury herein dealt with Seatrain as a "terminal operator" (A3024), defining its duty to the respondents as follows:

> "As a matter of law, however, I will advise you that Seatrain would have an obligation to notify the stevedoring company and personnel as to the existence of any dangerous condition which they knew about or should have known about." (A3027).

We submit that this charge accurately described the duty of a "terminal operator" to business invitees, such as the respondents. It is not disputed that a "terminal operator" is not a "vessel" for purposes of §902(21) of the Longshoremen's Act. And a terminal operator's duty herein can only be defined by the law

of New Jersey or the law of admiralty — there are no other options.

Petitioners might have contended that New Jersey law controls, inasmuch as Johnston's failure to warn occurred on land. *Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1971). But they would find little comfort here, because the duty of New Jersey owners and occupiers of land to business invitees is more stringent than that imposed by Justice Greenfield upon Seatrain herein. Not only is there a duty to warn but, additionally, a duty to "make safe". *Piro v. Public Service Electric & Gas Co.,* 103 N.J. Super. 456, 247 A. 2d 678, 682 (1968), *aff'd,* 53 N.J. 7, 247 A. 2d 667 (1968).

Alternatively, petitioners might have claimed that Seatrain's duty must be defined under maritime law since the culmination of the tort was upon a vessel resting in navigable waters. But there is no help here either. When a maritime defendant owes no *special* duty to the plaintiff under a particular statute (e.g., the Jones Act or the 1972 Longshoremen's Act), the standards to be applied on a negligence cause of action are governed by the General Maritime Law. The standard of care under the General Maritime Law is "reasonable care under the circumstances", as set forth in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 632 (1959).

The charge delivered by Justice Greenfield respecting the duty of Seatrain (A3027) defined "reasonable care under the circumstances", the "circumstances" here being that Seatrain either knew or should have known of the dangerous condition in the hold of the ASIALINER. Thus, if maritime law is applicable to Seatrain, then Justice Greenfield's charge served to properly tailor *Kermarec* to the particular facts of this case. On the other hand, as noted above, if New Jersey law governs, then Seatrain received the benefit of a more favorable charge than was warranted, and cannot be heard to complain. In fact, neither

Seatrain nor Denholm *ever* complained about the charge on the question of duty — no exceptions were taken thereto (A3066-73, A3079-91).

B. The Duty of Denholm

It is conceded that Denholm was the "operator" of the ASIALINER (p. 4). The term "vessel" includes "operator" under §902(21) of the Act, and, therefore, the holdings with respect to duty in *Scindia* are applicable to Denholm. Petitioners further concede that Denholm did not warn the respondents or the stevedore of the danger, arguing, on the authority of *Scindia*, that this was not necessary. The legal claim is that a shipowner has no duty to warn of hazards which would be "anticipated and avoided by a non-negligent stevedore." (p. 14). And, say petitioners, Justice Greenfield did not inform the jury of their version of the law.

As we now demonstrate, petitioners' "law" is fanciful, and there is no authority for it where the vessel interests have *created* the very condition that causes the damage. In such a case, the duty to warn is absolute. As Justice White of this Court said in *Scindia:*

> "The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; *and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.*" (451 U.S. at 167) (emphasis added).

Further on in Justice White's opinion, the following appears:

> "Yet it is quite possible, it seems to us, that Seattle's [the stevedore's] judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. *The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.*" (451 U.S. at 175-76) (emphasis added).

We submit that a reading of *Scindia* makes it abundantly clear that a vessel's duty to warn with respect to "hidden dangers" which "existed from the outset" is not qualified by any permission to rely upon the stevedore to uncover those dangers. To the same effect is *Lemon v. Bank Lines, Ltd.*, 656 F. 2d 110 (5th Cir. 1981). The plaintiff longshoreman therein was injured during discharge operations by a collapsing cargo stow. The Fifth Circuit first noted the shipowner's duty, under *Scindia*, "to at least warn the stevedore of hidden danger. . . ." (656 F. 2d at 115), and then went on to say that:

> "*The shipowner is therefore responsible for eliminating dangerous conditions which exist at the outset* of the stevedoring operations, *id.* at 1621-22, but has 'no duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operation.' " (656 F. 2d at 115) (emphasis added).

And where the dangerous condition is *created* by the vessel, *Lemon* states in unequivocal terms that the *Scindia* duty to warn is *absolutely unqualified* by any reliance upon the stevedore's ability to discover and avoid:

> "However, in light of *De Los Santos [Scindia], considerations of the stevedore's awareness of and degree of control over a dangerous situation are irrelevant when the existence of the dangerous condition is attributable to the negligence of the shipowner.*
>
> * * *
>
> The Supreme Court clearly established that *the ability of a longshoreman to recover cannot turn on who was in the best position to recognize and remedy a dangerous condition when that condition was created by a vessel owner* who knew or should have known of its existence prior to the stevedore's operations. The Court specifically imposed a duty on the shipowner to at least warn the stevedore of any dangerous condition, existing at the outset of the stevedoring operations, of which the shipowner should have been aware through the exercise of reasonable care." (656 F. 2d at 116) (emphasis added).

Standing for the same proposition are *Helaire v. Mobil Oil Co.*, 709 F. 2d 1031, 1036 (5th Cir. 1983); *Stass v. American Commercial Lines, Inc.*, 683 F. 2d 120, 122 (5th Cir. 1982) and *DiRago v. American Export Lines, Inc.*, 636 F. 2d 860, 868-69 (3rd Cir. 1981), *cert. denied*, 449 U.S. 890.

Petitioners attempt to circumvent all of this authority by arguing that the inadequate lighting and the failure to supervise discharge of hazardous cargo were "conditions" that arose *during* discharge operations (p. 13). But the attempt is transparent. The failure to *install* and *design* adequate lighting in the hold was permanent (A398, A886-87, A917-18, A976, A1114), and the failure to supervise related to the pre-existing hidden condition of hazardous cargo in the hold.

Another post-*Scindia* case which is particularly relevant on the facts is *Turner v. Japan Lines, Ltd.*, 651 F. 2d 1300 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 294. The plaintiff longshoreman therein was injured while discharging cargo improperly stowed by independent foreign stevedores, and the Ninth Circuit held that the shipowner had an absolute duty to warn or correct:

> "The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. *As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoremen. The offloading stevedore has no control whatsoever over the foreign stevedore. The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore.* We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least,

> no practical remedy. *We hold, therefore, that the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of.*" (651 F. 2d at 1304) (emphasis added).

Petitioners apparently argue that their responsibility herein was non-existent because the area of the accident was "under stevedore control" (p. 14). Query what effect "control" has in this regard, after *Scindia*, where the shipowner created the dangerous condition and it existed prior to "turn over" of the area to the stevedore. *Lemon, supra*, 656 F. 2d at 116; *Subingsubing v. Reardon Smith Line, Ltd.*, 682 F. 2d 779, 780 (9th Cir. 1982); *DiRago v. American Export Lines, Inc.*, 636 F. 2d 860, 868-69 (3rd Cir. 1981), *cert. denied*, 449 U.S. 890. In any event, it is absurd to claim that the unlocked 20 footers, lying in the depths of the darkened hold, could in any meaningful way have been under the "control" of the stevedore. The pre-*Scindia* cases required a showing that the area in question had come under the "exclusive control" of the stevedore before legal responsibility could pass. *Barulic v. French Lines*, 75 A.D. 2d 761, 427 N.Y.S. 2d 815, 817 (1st Dept. 1980), *cert. denied*, 451 U.S. 908 (1981); *Sarauw v. Oceanic Navigation Corp.*, 622 F. 2d 1168, 1172 (3rd Cir. 1980).

Petitioners' legal objections to the jury charge die for simple lack of authority. But even if this were not so clearly true, it would be of no moment. This is because Justice Greenfield's charge was correct under *Scindia* for entirely *independent* reasons. Indeed, as demonstrated immediately above, the instruction regarding Denholm's duty to warn was entirely appropriate inasmuch as the vessel created the danger, but, in point of fact, Justice Greenfield did not describe an unqualified duty. What he *did* was to instruct the jury that it was in its province to determine the

extent of the duty; *i.e.*, did Denholm have a "continuing obligation" to supervise loading and discharge or was it, in fact, entitled to rely upon the expertise of the stevedore. As Justice Greenfield put it:

> "So, I will ask you first to focus on the question of the responsibility of Denholm, i.e., the ship personnel. *Was there a continuing obligation on the part of the ship's officers of Denholm to supervise the loading and handling of cargo? Is that something that they had a responsibility for or was their responsibility discharged once they said to the stevedore, 'You undertake to load and unload and we have nothing further to do with it.'* " (A3015-16) (emphasis added).

The jury herein was fully empowered to make a finding of "continuing obligation" and the authority for that is, once again, none other than *Scindia*. All three *Scindia* opinions (White, Brennan and Powell) stated that the duty defined therein could be overridden by specific "custom and practice" to the contrary (451 U.S. at 176, 179-80).

Respondents herein presented copious testimony on the custom and practice relating to discharge operations on container vessels. As noted above, Slapkowski testified that the practice on *other* container vessels was that "the cargo officer was always present when we were working the hatch." (A177). Captain Hopkins stated that the custom and practice aboard container vessels is for the officers to be present on deck when cargo is handled to see that the job is properly done and all safety precautions are taken (A578). He went on to say that "as long as the cargo is being worked you must have a duty officer on the deck of that ship", and "it makes no difference" if an independent stevedore has been hired to provide the labor (A590).

Petitioners were not able to rebut respondents' proof in any way (*see* A997, A1211). Thus, a jury finding that Denholm had a "continuing obligation to supervise" was fully warranted upon the proof adduced. And the finding of such a duty, based upon custom and practice, is supported by many authorities, both before and after *Scindia; e.g., Turner, supra,* 651 F. 2d at 1305.

Furthermore, petitioners' entire "legal" argument that they were entitled to "anticipate" that the stevedore would discover or avoid the danger lurking in the unlit hold is ultimately premised upon the *factual* claim that there was some sort of "practice" of unloading 20 foot containers at Weehawken one by one with "wires" (*e.g.*, pp. 6, 10, 16). But there is nothing to this. It is probably enough to point that there *could* be no "practice" with respect to 20 foot containers below deck inasmuch as they had never been stowed there before (A313, 315-16).

Petitioners' witness Mitchell is the source of "practice" evidence respecting the "wire" method (p. 10), but this source was less than solid. At one point, Mitchell *thought* that 20 foot on-deck containers "weren't taken off with one pick" (A894) [and petitioners adopt that claim here (p. 6)], but later, when confronted with the fact that Mr. Conversano's longshore gang *had* removed on-deck 20 footers while locked to their flatracks (A3135), Mitchell conceded that Conversano could have done this "if eight corners were locked in" (A925). In response to a question from the Court, Mitchell stated that "you can lift it up as one unit with no problem, sir." (A926).

In any event, there was nothing left to petitioners' "wire practice" after respondents read the explicit testimony of the vessel's own Captain Munro:

> "Q. When they were carried on deck, the containers were locked to the flatrack? A. Yes.

> That was the intention of on deck. *They were discharged that way.*
>
> Q. And they were discharged as one pick; you know what I mean? A. *That was the intention, yes."* (A1207) (emphasis added).

Also relevant in this regard is the accident report prepared by respondents' employer, United Terminals Inc., in which the following appears:

> "Crane operated by Walter Slapkowski was removing container units from center cell of no. 10 hatch, *two 20 foot units not connected at the bottom with special racks designed for lifting as one 40 foot unit* allowed the two units to split when they cleared the cell." (A3125) (emphasis added).

II.

THERE WAS NO ERROR IN THE CHARGE RESPECTING DAMAGES.

Petitioners *now* complain that the jury was not instructed to deduct income taxes (pp. 18-19), citing *Fanetti v. Hellenic Line, Ltd.*, 678 F. 2d 424 (2nd Cir. 1982) as authority. Without discussing the merits of *Fanetti*, it is enough to set forth the following language from that case:

> *"But Hellenic, unlike the defendant Liepelt, offered no evidence to establish what amount of future taxes plaintiff would have incurred.* Hellenic did not seek a stipulation from plaintiff on the point before resting its case. While plaintiff's more recent tax returns had been received in evidence

> to prove his past earnings, Hellenic did not indicate before the evidence closed that it would rely on those returns to quantify future taxes, thereby depriving plaintiff of an opportunity to offer his own evidence, expert or otherwise, of what his future taxes might be. *For that reason we reject Hellenic's argument that the trial judge should have instructed the jury on the basis of the past tax returns, or use them to make future tax calculations herself.*" (678 F. 2d at 432) (emphasis added).

In the same fashion, petitioners herein offered no proof on the subject of taxes, obtained no relevant stipulation, did not proffer income tax returns, and did not even ask the expert witness, Dr. Berenson, for his opinion on the subject of income taxes. Thus, there is absolutely no foundation for arriving at a net award in this case. In his decision below, Justice Greenfield took appropriate cognizance of the "state of the proof" on this issue: "In any event, the defendants offered no proof of any facts which would give the jury an alternative mode of calculation." (A14).

Petitioners attempt to surmount their fatally deficient record in this regard by now claiming that Justice Greenfield "ruled as a matter of law that tax liability could not be proven. . . ." (p. 19). Justice Greenfield did no such thing. At the page of the transcript cited by petitioners (A2566) it will be observed that the Court received a note from a juror "about the effect of income taxes." (emphasis added). He then declared that "I will not put the question to the witness [Dr. Berenson]" [A2566), and this was certainly proper. The question did not relate to a hypothetical *amount* of taxes, but rather to the "effect" of taxes. This is a legal question which Dr. Berenson was not competent to answer, and Justice Greenfield went on to say that, at the proper time, he would instruct the jury on the subject. The Court's comment

was *solely* in response to the juror's note, was not directed at defense counsel in any way, and did not occur during the defense's cross-examination. Justice Greenfield certainly did not prohibit defense counsel from attempting to ascertain what the plaintiffs' taxes would be in the event that they might properly be taken into account. Furthermore, defense counsel did not object to the Court's comment or make any offer of proof at this point or anywhere else. And no exception was taken to the instruction not to consider the effect of taxes on lost future wages (A3052).

CONCLUSION

For all of the reasons discussed above, petitioners' application for a writ of certiorari should be denied.

Dated: New York, New York
March 28, 1984

Respectfully submitted,

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